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IN THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1970

No. 1520

~~Misc.~~

MARGARET RUTH HORTON, PETITIONER

v.

STATE OF NORTH CAROLINA, Respondent

* *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

* *

PETITION FOR WRIT OF CERTIORARI

* *

Margaret Ruth Horton

410 Upton Street
Winston-Salem, North Carolina

Margaret Ruth Horton
Petitioner
Per Se

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IN THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1970

NO._____

Misc.

MARGARET RUTH HORTON, PETITIONER

v.

STATE OF NORTH CAROLINA, RESPONDENT

* *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

* *

The petitioner, Margaret Ruth Horton, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered July 28, 1969.

OPINION BELOW

The judgment was rendered at the October 1968 Criminal Session of Iredell County, which judgment upon appeal was affirmed by the North Carolina Court of Appeals and filled on June 18, 1969, being No. 6922SC147.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254.

QUESTIONS PRESENTED

1. Was it a violation of defendants rights for the Court to admit evidence against the defendant which was the product of an unconstitutional search and seizure, without securing defendants waiver to the introduction of such evidence, as under the Fourth and Fifth Amendments. Constitution of the United States.

2. Was it a violation of defendants rights to not be given notice prior to the Grand Jury Proceedings also suitable notice prior to the jury trial of October 21, 1968 and to be taken on capias instantly before the Honorable Walter E. Johnston on October 20, 1968 and to be held in custody while under good and sufficient bond also without counsel. As in Amendment 5, 6, and guarantee in Amendment 14. Notice, Confrontation, tri by jury, compulsory process for obtaining witnesses and aid of counsel. United States Constitution.

3. Was defendants rights violated when the indictment as found by the grand jury changed as in Amendment 5 - - Rights of Pers Constitution of the United States.

4. Was defendants rights violated when conviction is obtained by Perjured Testimony Amendment 14 - Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT FOURTEEN.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons to be seized.

AMENDMENT V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property, be taken for public use without just compensation.

AMENDMENT 5 - RIGHTS OF PERSONS

Apperson can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument. A change in the indictment deprives the court of the power to try the accused.

STATEMENT

Your petitioner was indicted for the crime of conspiracy to commit murder, and same came on for trial at the 21st October, 1968 term of Superior Court; from a verdict of guilty as charged, petitioner appealed. In its opinion noted above the North Carolina Court of Appeals affirmed the conviction of petitioner.

"In January of 1967 defendant became acquainted with Robert Lee James (James) who is named co-conspirators in the indictment which charges that defendant with Robert Lee James and Carl Reuben Deal on the 6th day of May, 1967 and thereafter conspired to kill and murder one Lee Roy Horton. In late April of 1967 James and defendant rode around together and had a conversation which resulted in defendant telling James she wanted someone to do something to her husband. James asked defendant what she wanted and she said she wanted a little more than having her husband "beat or roughed up." James told defendant he knew a man who might do something like that and he was in New York. James and defendant drove back to Statesville and from a pay station James called Carl Deal (Deal) but left the impression with defendant that he was calling New York City. Thereafter James and defendant drove to the Charlotte Airport for the

purpose of meeting Deal, who was driving there from Taylorsville, but James and Deal implied that Deal was arriving on a plane from New York. James gave to Deal a .38 pistol with some bullets he had bought for it and introduced Deal to defendant as Joe Fratt. Defendant and Deal and James discussed the price for getting the job done and defendant paid $1,250.00 to Deal that night and agreed to pay him more the next night. They went to a farmhouse together which Deal was advised defendants husband frequented and where they could do the job. The next night defendant paid an additional $1,300.00 to Deal. James and Deal later scattered cigeratte butts around the upstairs window of the farmhouse and told defendant they had waited many hours for her husband who never arrived. Deal returned to Taylorsville and neither Deal nor James did any harm to defendants husband. Several days later defendant saw James and said,"You fellas took me, didn't you?" and demanded that James return her money; he did not return any money. Five or six months later there was a bombing in Statesville (the record does not show it to be related to this case) and after said bombing James and Deal talked to the police about their dealings with defendant.

The record explicitly shows that both James and Deal testified that at no time did they have any intention of killing or hurting defendants husband. The record also shows that defendant made a motion for nonsuit at the close of the States evidence which was overruled.

The Court of Appeals decision in effect disregards the rule of law that the State is bound by its own uncontradicted evidence. It is

settled law that if there is a conflict in the State's evidence then on motion for judgment of nonsuit it should be viewed in the light most favorable to the State, and forwarded to the jury to pass upon the conflict. However, in the instant case there was no conflict at all. The fact that money was received or that a gun was had or bullets purchased does not in any way conflict with the statements of Deal and James when they said they never intended to hurt defendants husband. Rather the above mentioned facts corroborate, since these articles were used as props in order to fool defendant and obtain her money. What the court did by overruling the motion for nonsuit was to allow the jury to conjecture that James and Deal "changed their tune" between the time alleged in the bill of indictment and five or six months later, rather than "infer from the evidence" that James and Deal had "changed their tune". The jury had nothing to consider because as a matter of law James and Deal spoke for the State, when there was no evidence to the contrary for the State; therefore the jury should not have been allowed to consider whether or not they were lying about not intending to hurt Horton since their veracity was not at issue. There was no evidence, circumstantial or direct which was contra to James and Deals statements. Accordingly, it was not a question for the jury and motion for nonsuit should have been allowed.

It was said in State v. Robinson, 229 N.C. 647, 50 S.E. 2d 740 (1948) "When--the

State's case is made to rest entirely on testimony favorable to defendant, and there is no evidence contra which does more than suggest a possibility of guilt or raise a conjecture, demurrer thereto should be sustained. State v. Todd, 222 N.C. 346, 23 S.E. 2d 47; State v. Watts, 224 N.C. 771, 32 S.E. 2d, 348; State v. Coffey, 228 N.C. 119, 44 S. E. 2d, 886.

"When the State offers evidence which tends to exculpate the defendant, he is entitled to whatever advantage the testimony affords and so, when it is wholly exculpatory, he is entitled to his acquital." See also North Carolina Evidence, Stansbury 2 Ed, 1963, Sec. 40, P. 80.

It is apparent that James and Deal's statements exculpated defendant; it is equally apparent that the statements of James and Deal was all of the evidence the State presented on this point.

Further, it is said in C.J.S. 15A, Conspiracy, Sec. 37, p. 731; "If one person only feigns acquiescense in a proposal of another to pursue an unlawful enterprise, there is no conspiracy, since there is no union or concert of wills." This is the exact situation here since James and Deal only feigned acquiescense in order to obtain defendant's money.

The Constitution of the United States in Amendment XIV prevents any state from depriving any person of his liberty without due process of law, and (also) requires equal protection of the law be extended to all persons. The Supreme Court in not applying

the rule that the State is bound by it's own uncontradicted evidence has deprived defendant of her liberty without due process. Also the Supreme Court, in not giving defendant the benefit of said rule failed to give to her equal protection under the law since said rule is well recognized as a part of the law of this state.

It was said in State v. Burton, 158 SE 2d 883 (1968) where Justice Branch quoted Justice Higgins as follows; "..There must be substantial evidence of all material elements of the offense to withstand a motion to dismiss. Substantial evidence of guilt is required before the Court can send a case to the jury." The Court quotes with approval from State v. Harvey, 228 N.C. 72, 44 SE 2d 472 where Chief Justice Stacy said; "True it is, the evidence seems to point an accusing finger at the defendant as the perpetrator of the crime, and to excite suspicion somewhat strongly perhaps of his guilt, but it apparently leaves to much to surmiss or assumption to support a conviction." The instant case compelled the jury to speculate as to whether or not James and Deal actually did agree and are now merely testifying that they didn't agree in order to save their hide. This is a matter of speculation and conjecture. The evidence is that they did not agree but only feigned agreement.

Likewise it is settled law that a judicial act is an act of State so as to come within the purview of the Fourteenth Amendment to the Federal Constitution. This was announced in the landmark case of Shelley v. Kraemer, 68 SC 836, here the United States Supreme Court said; "It has been the consistent ruling of

this Court that the actions of the states to which the amendment has reference, includes actions of state courts and state judicial officials." The provision in the Fourteenth Amendment against denial of due process to a litigant is made directly applicable to states' action in judicial proceedings as well as through other agencies of the State."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Constitution of the United States:

AMENDMENT IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT V.

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval

forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.A. (1254).

QUESTIONS PRESENTED

1. Was it a violation of defendants rights for the court to admit evidence which was the product of an unconstitutional search and seizure, without securing defendants waiver to the introduction of such evidence, as under the Fourth and Fifth Amendments to the Constitution of the United States.

2. Was it a denial of defendants rights under the Fifth Amendment of the Consitutiton of the United States for the Indictment as found by the grand jury changed.

3. Was defendants rights violated when conviction was obtained by purgered testimony.

4. Did the defendant have her rights violated when the Supreme Court of North Carolina didn't apply the rule that the State is bound by its own uncontradicted evidence, also the Constitution of the United States prevents any state from depriving any person of his liberty without due process of law.

1. Security "in their persons, houses, papers, and effect" is assured to the people by this article. There is no evidence there was a search warrant for photographs taken in the farmhouse. Boyd v. United States 116 U.S. 616. The seizure of a mans private papers to be used in evidence against him is equivalent to

compelling him to be a witness against himself and in a prosecution for a crime, penalty or forfeiture, is equally within the Fifth Amendment. The Fifth Amendment declares that no person "shall be compelled to be a witness against himself." 267 U.S. 148 In Silverthorne Lumber Company v. United States 251 U.S. 385 a writ of error was brought to reverse a judgment of contempt of the District Court, fining the company and imprisoning one Silverthorne, its President, untill he should purger himself of contempt in not producing books and documents of the company before the grand jury to prove violation of the statutes of the United States by the Company and Silverthorne. Silverthorne had been arrested and while under arrest the marshal had gone to the office of the company without a warrant and taken books, papers and had taken copies and photographs of the papers. This was held to be an unreasonable search of the property and possessions of corporation and the judgment for contempt was reversed.

2. Amendment 5 under the Constitution of the United States -- Rights of Persons -- A person can be tried only upon the indictment as found by the grand jury, and especially upon the changing part of the instrument. A change in the indictment deprives the court of the power to try the accused. Exparte Bain, 121 U.S. 1.12 (1887). When the indictment is filed with the court no change can be made in the body of the instrument

by order of the court, or by the prosecuting Attorney and the fact that the court may deem the change immaterial, as striking out of surplus words makes no difference. The instrument as thus changed is no longer the indictment of the grand jury which presented it. A trial on such an indictment is void. There is nothing to try (in the language of the constitution) which the prisoner "can be held" to answer. According to principals long settled in this court the prisoner who stands sentenced to the pententiary on such trial is entitled to his discharge. Mr. Justis Yates said that an endictment being upon oath cannot be amended. 121 U.S. 8. The People v. Campbell 121 U.S. 9-10. The great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoners trial for a crime and without which the constitution says "no person shall be held to answer" may be frit-away until its value is almost destroyed. State v. Sexton 121 U.S. 8-9.

3. The due process clause of the Fourteenth Amendment governs any action of a state through its legislature, its Courts, or its executive officers, including action through its prosecuting officers. A criminal conviction procured by the State Prosecuting authorities solely by perjured testimony known by them to be purjured and knowingly used

by them in order to procure the conviction, is without due process of law and in violation of the Fourteenth Amendment. When a conviction is obtained by the presentation of testimony known to be purjured, the constitutional requirement of due process is not satisfied. That requirement "cannot be deemed to be satisfied by mere notice and hearing if a State has contrieved a conviction through a pretense of a trial which in truth is used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be purjured. Mooney v. Holahan, 294 U.S. 103, 112 (1935). There were no cigeratte butts on the floor or around the windows in the photographs taken of the interior of the old farmhouse. The State maintains the States Witnessess, James and Deal purjured themselves.

4. If the witnessess did not purge themselves the State is bound by its own uncontradicted evidence, as in the Fourteenth Amendment. It was said in State v. Robinson, 229 N.C. 647, 50 S.E. 2d 740 (1948) "When the States case is made to rest entirely on testimony favorable to the defendant, and there is no evidence contra which does more than suggest a possibility of guilt or raise a conjecture, demurrer thereto should be sustained.

State v. Todd, 22 N.C. 346, 23 S.E. 2d 47; State v. Watts, 224 N.C. 119, 44 S.E. 2d, 886.

5. Amendments Five and Six (notice and confrontation, trial by jury, compulsory process, of obtaining witnessess, and aid of counsel. The Court has relied upon this provision in holding that an accused shall plea, or be ordered to plea, or a plea of not guilty be entered for him before his trial proceeds, and in ruling that if the accused is in custody he must be personally present at every stage of the trial where his substantial rights may be effected by the proceedings against him. It is not within the power of the accused or his Attorney to waive such right. When the Constitution requires a hearing it requires a fair one ---- An opportunity must be given not only to present evidence, but also to know the claims of the opposing party and to meet them.

REASONS FOR GRANTING OF THIS WRIT

This Writ should be granted because the North Carolina Supreme Courts decision is in conflict with all States. Likewise the Constitution of the United States prevents any State from depriving any person of his liberty without due process of law, and requires equal

protection of the law to all persons.

CONCLUSION

Defendant feels there is proper cause for review of this case and believes there are reasonable grounds for reversal upon such review.

Therefore this Petition for Writ of Certiorari is respectfully submitted and defendant prays that a Writ of Certiorari issue that this court might review the instant case.

Margaret Ruth Horton
Petitioner
Per Se

Margaret Ruth Horton
410 Upton Street
Winston-Salem, North Carolina

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Appendix To Petition

~~United States Court Of Appeals~~

No. 6922SC147

State Of North Carolina,

Appellee,

versus

Margaret Ruth Horton,

Appellant

Appeal from the North Carolina State Supreme Court at Raleigh.

Decided November 19, 1969.

Defendant assigns as error the denial of her motions for judgment as of nonsuit and contends that she was denied due process and equal protection of the laws when the Court of Appeals failed to apply the rule that the State is bound by its uncontradicted evidence.

In State v. Gallimore, 272 NC 528, 158 SE 2d 505, this Court defined a conspiracy as follows: "A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means. (Citing many cases)' State v Goldberg, 261 NC 181, 134 SE 2d 334: State v. McCullough, 244 NC 11, 92 SE 2d 389. A conspiracy to commit a felony is a felony. State v. Brewer, 258 NC 533, 129 SE 2d 262: State v. Abernethy, 220 NC 226, 17 SE 2d 25. The crime is complete when the agreement is made. State v. Davenport, 227 NC 475, 42 SE 2d 686: State v. Whiteside, 204 NC 710, 169 SE 711; State v. Knotts, 168 NC 173, 83 SE 972. Many jurisdictions follow the rule that one overt act must be committed before the conspiracy becomes criminal. Our rule does not require an overt act.

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Since our rule does not require an overt act, an attempted withdrawal by one of the conspirators before an overt act in furtherance of the agreement will not prevent a verdict of guilty of conspiracy. 16 Am. Jur. 2d, Conspiracy, Sec. 29, at 142. Nor is it necessary for the purpose of the conspiracy to be accomplished in order for a verdict of guilty to stand. Goldman v. United States, 245 US 474, 52 L. ed. 410. There can be no conspiracy unless there is a union of wills, and if only one person feigns acquiescence in a proposal of another to pursue an unlawful enterprise, there is no conspiracy. One person cannot conspire with himself. State v. Tom, 13 NC 569; 15 C.J.S., Conspiracy, § 37, p. 730. However, if three or more conspire to commit a crime, the fact that there is a union of purpose between only two will not bar a prosecution and conviction of the two. 15A C.J.S., Conspiracy, § 37, p. 730. The unsupported testimony of a co-conspirator is sufficient to sustain a verdict, although the jury should receive and act upon such testimony with caution. State v. Tilley, 239 NC 245, 79 SE 2d 473.

The rule relating to sufficiency of evidence to carry a case to the jury is concisely stated in the case of State v. Stephens, 244 NC 380, 93, SE 2d 431. We quote therefrom:

If there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.' The above is another way of saying there must be substantial evidence of all material elements of the offense to withstand the motion to dismiss. It is immaterial whether the substantial evidence is circumstantial or direct, or both. To hold that the court must grant a motion to dismis unless, in the opinion of the court, the evidence excludes every reasonably hypothesis of innocence would in effect constitute the presiding judge the trier of the facts. Substantial evidence of guilt is required before the court can send the case to the jury. Proof of guilt beyond a reasonable doubt is required before the jury can convict. What is substantial evidence is a question of law for the court.

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What that evidence proves or fails to prove is a question of fact for the jury. S. v. Simpson, ante, 325; S. v. Duncan, ante, 374; S. v. Simmons, supra; S. v. Grainger, 238 NC 739, 78 SE 2d 769; S. v. Fulk, 232 NC 118, 59 SE 2d 617; S. v. Frye, 229 NC 581, 50 SE 2d 895; S. v. Strickland, 229 NC 201, 49 SE 2d 469; S.v. Minton 228 NC 518,46SE 2d 296; S. v. Coffey, 228 NC 119, 44 SE 2d 886; S. v. Harvey, 228 NC 62, 44 SE 2d 472; S. v. Ewing, 227 NC 535, 42 SE 2d 676; S. v. Stewinter, 211 NC 278, 189 SE 868; S.v. Johnson, supra."

In the instant case the decision must stand or fall upon the testimony of two alleged co-conspirators who, in the course of their testimony when offered as State's witnesses, testified as to the circumstances surrounding the alleged conspiracy, and in their further testimony stated that they never intended to harm defendant's husband. Defendant contends that the State, offering them as its witnesses and worthy of belief, has made out a complete defense entitling defendant to nonsuit. The State, on the other hand, contends that the testimony of the alleged co-conspirators shows such circumstances and conduct as to carry the question of defendant's guilt to the jury.

It is well established in this jurisdiction that a party cannot introduce testimony to impeach or discredit the character of his witness, and when in a criminal action a complete defense is established by the States's evidence, a defendant may avail himself of such defence by a motion for judgment as of nonsuit. Yet, if the witness testifies to facts against the State's contentions, the State is not precluded from showing the facts to be other than as testified to by the witness. State v. Jarrell, 233 NC 741, 65 SE 2d 304; State v. Todd, 222 NC 346, 23 SE 2d 47; State v. Cohoon, 206 NC 388, 174 SE 91; Smith v. R. R., 147 NC 603, 61 SE575. It is equally well established that when the substantive evidence offered by the State is conflicting-some tending to inculpate and some tending to exculpate the defendant- it is sufficient

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to overrule a motion for judgment as of nonsuit. State v. Litchum, 258 NC 397, 128 SE 2d 665; State v. Bass, 255 NC 42, 120 SE 2d 580; State v. Vaughn, 249 NC 329, 96 SE 2d 39; State v. Tolbert, 240 NC 445, 82 SE 2d 201.

It must be borne in mind that the State offered no evidence to impeach the testimony of its witnesses except for questions as to the past record of the witness James, which were asked and answered without objection. The State vouched that witnesses were worthy of belief as to all of their testimony, and where there was contradiction in the testimony, it was for the jury to believe all the testimony or to believe a part, and reject a part, or to to reject it all, because it is the trier of the facts, Brown v. Brown, 244 NC 485, 141 SE 2d 875; State v. Vaughn, Supra; State v. Henderson, 130 NC 735, 105 SE 599; State v. Ellis, 97 NC 447, 28E 525; State v. Overton, 75 NC 200.

In the case of Smith v. R. R., supra, we find the following:

"While it is accepted doctrine that one who offers a witness 'presents him as worthy of belief, and except, perhaps, where an examination is required by the law, as in the cases of subscribing witnesses to wills and deeds... a party will now be allowed to disparage the character or impeach the veracity of his own witness, nor to ask questions or offer evidence which has only these purposes in view, it is always open to a litigant to show that the facts are otherwise than as testified to by his witness..... And this he may do, not only by the testimony of other witnesses, but from other statements of the same witness, and at times by the facts and attending circumstances of the occurrence itself, the res gestae." (Emphasis ours)

The above was quoted with approval in the case of State v. Cohoon, supra. See also Worth Co. v. Feed Co., 172 NC 335, 90 SE 295.

Defendant relies on the case of Odneal v. State, 117 Tex. Cr. App. 97, 34 SW 2d 595, where

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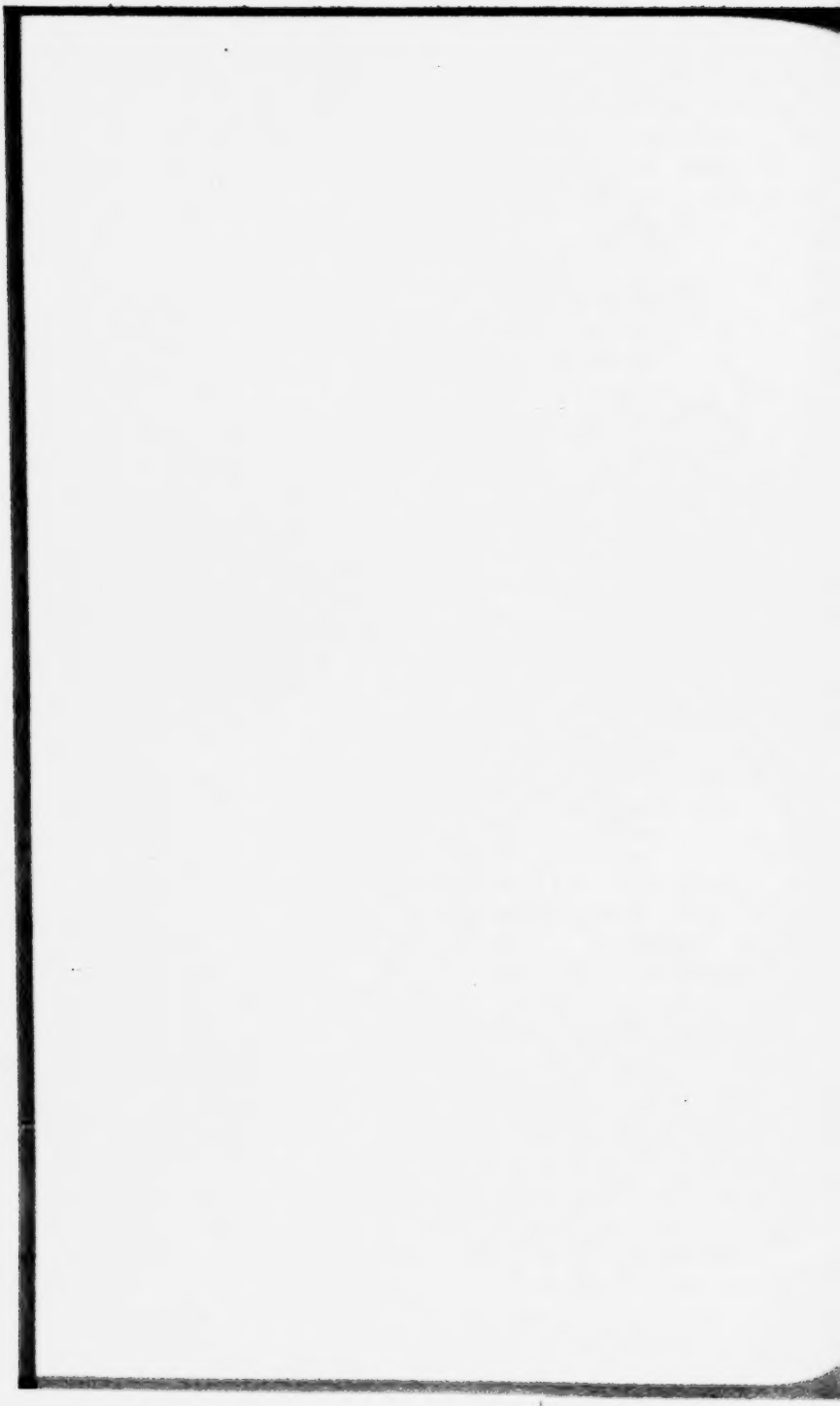

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an accomplice testified on direct examination that he had entered into a conspiracy with the defendant and testified on cross-examination that he never intended to carry out the agreement. The court submitted this case to the jury to decide whether the witness intended to carry out the conspiracy.

Ddfendant contends that Odneal v. State, supra is distinguishable from the instant case because here witnesses only testified as to what they were paid to do on direct examination, and testified on cross-examination that they never intended to do it. The fallscy in defendant's argument is that a criminal conspiracy may be established by circumstantial evidence from which the conspiracy may be legitimately inferred. State v. Butler, 26, NC 733, 153 SE 2d 477. The validity of the type of evidence here relied upon by defendant recognized in the case of State v. Whiteside, 204 NC 710, 169 SE 711. There, the defendants Whiteside and Cannon pleaded not guilty. The State offered evidence which tended to show that defendant Whiteside was caught in the act of robbing the theatre, together with evidence that defendants had been acquainted for over a year and had "bummed" their way into Asheville on a train; that they both spent the night at the Salvation Army and on the next day saw State's witness McDuffie. McDuffie testified that Cannon asked him if the Imperial was a good place to rob. Whiteside testified that Cannon had nothing to do with the robbery and that he did not even know Cannon. He further testified that State's witness McDuffie suggested to him that the Imperial Theatre was a good place to rob and that he (McDuffie) would help commit the robbery. The jury returned a verdict of guilty as to Cannon, who appealed. This Court, in holding that there was sufficient evidence to overrule defendant's motion as of nonsuit, stated:

Direct proof of the charge (conspiracy) is not essential, for such is rarely obtainable, It may be, and generally is, established by a number of indefinite acts, each of which, stand-

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ing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. S. v. Wrenn, supra. When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficuly to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists, 5 RCL, 1088.

So, in the instant case, notwithstanding the positive testimony of Whiteside to the contrary, and the rather 'broken reed' upon which the State is compelled to rely, we think the evidence is sufficient to carry the case to the jury. Its credibility was for the twelve."

Thus, the situation of the parties and their relations to each other, together with the surrounding circumstances and the inferences deducibly therefrom, may furnish ample proof of conspiracy even in the face of positive testimony to the contrary.

Defendant also contends that the case of Woodworth v. The State, 20 Tes. Cr. App., 375, supports her position. There, the witness Hunt testified that he intended to trap defendant Woodworth in the act of committing a burglary. He agreed with Hunt on a specific time when he would help him commit the burglary, but as soon as the plan was made Hunt dispatched a note advising the Sheriff of the plan so that he could be on hand at the proper time and place and make the arrest. The Sheriff testified that he received the note and acted accordingly. This case is clearly distinguishably from the instant case because there the surrounding circumstances and the testimony of the witnesses, with-

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out contradiction or conflicting inferences, showed no unity of purpose to commit an unlawful act.

Defendant seriously argues that in addition to the statement of the alleged co-conspirators that they did not intend to harm her husband, certain acts, such as giving Deal a false identity and the scattering of cigarette butts in the farmhouse to make it appear that they had lain in wait for her husband, tended to negate any union of purpose to do an unlawful act. In this connection the witness James, referring to Deal testified: "He is a friend of mine and he is from out of town. I wanted to get somebody she didn't know... If it was someone around here that would kill him, she might have known about it," The witness' interest in further concealing the identity of a friend about to be asked to engage in an unlawful act is understandably. The other acts which defendant contends tend to negate the alleged conspiracy cannot be related to the night that James agreed to obtain someone to do "a little more than beat up or rough up" defendant's husband. One of the strongest indications of an unlawful agreement is found in the testimony of the witness Deal. Deal testified that after the telephone call from James (which must have been during the third meeting between James and defendant and in defendant's presence). James came to his home in Taylorsville and at that time stated to him that "He knew a old gal in Statesville that we could get a little piece of money out of, and said that she wanted to get something done to her husband, and he said that she wanted to go further than roughing him up, and I said that I wouldn't do anything like that." This testimony permits a strong inference that up until the very moment that Deal refused to go along with the plan to murder defendant's husband. Without attempting to review all of the indicia of conspiracy found in th State's rbifinvr, er noyr yhsy $2550 in cash was accepted by James and Deal from defendant, and James explained the purpose of the payment by testifying,"I received the money for doing just what

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we were talking abour, to kill him," The testimony here referred to and the other facts found in the State's evidence are all colored by a delay of several months before either of the alleged co-conspirators talked with the police. Surely, without the statement of the alleged co-conspirators that they never intended to harm defendant's husband, there was sufficient evidence to raise an inference of intent to form a conspiracy between James and defendant - and probably between defendant, James and Deal. The denial of intent by both of the alleged conspirators created a conflict in the State's evidence which, upon a consideration of the evidence in a light most favorable to the State, presented a question for the jury.

The decision of the Court of Appeals is

Affirmed